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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

LA VELDA SINGLETON dba LOVE AND CARE PRESCHOOL.

Plaintiff.

vs.

TRAVELERS INDEMNITY COMPANY OF
CONNECTICUT, et al.,

Defendants.

| Case No.: CV 08 1852 (CW)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
TRAVELERS' CONSOLIDATED RULE
12 MOTIONS:**

- (a) TO DISMISS (FRCP 12(b)(6);
- (b) TO STRIKE (FRCP 12(f)); and/or
- (c) FOR A MORE DEFINITE
STATEMENT (FRCP 12(e))

Hearing Date: May 22, 2008
Time: 2:00 p.m.

1
TABLE OF CONTENTS

2	I. INTRODUCTION AND SUMMARY	1
3	II. BACKGROUND	1
4	A. The Policy	1
5	B. The Loss	4
6	C. The Actual Cash Value Payments	4
7	D. Plaintiff's Delay In Making Repairs	5
8	E. Subsequent Events.....	6
9	F. The Complaint.....	6
10	III. MOTION STANDARD	7
11	IV. ARGUMENT	7
12	A. The Fourth, Fifth, And First Causes Of Action Should Be Dismissed	7
13	1. The Claims Are Not Stated With Requisite Particularity.....	7
14	2. The Claims Are Time-Barred.....	8
15	3. At A Minimum, The Court Should Strike Portions Of The Claim	10
16	B. The Seventh Cause Of Action (Negligence) Should Be Dismissed.....	10
17	C. The Second Cause Of Action (Breach of Contract) Should Be Dismissed.....	11
18	1. Travelers Was Not Obligated To Pay For The Building Damage On A “Diminution In Value” or “Replacement Cost” Basis	12
19	2. Travelers Was Not Obligated To Pay For The Contents Loss On A “Diminution In Value” or “Replacement Cost” Basis	12
20	3. Travelers Was Not Obligated To Pay For Business Interruption.....	13
21	4. At A Minimum, The Court Should Strike Portions Of The Contract Claim	13
22	D. The Court Should Strike Portions Of The Bad Faith Claim	13
23	1. The Valuation And Business Interruption Allegations Should Be Stricken.....	14
24	2. The Code Upgrade Allegations Should Be Stricken.....	14
25	3. The EUO Allegation Should Be Stricken	15
26	V. CONCLUSION	16
27		
28		

1
2 **TABLE OF AUTHORITIES**
3

4	Page(s)
CASES	
5 <u>Ackerman v. Northwestern Mut. Life Ins. Co.,</u>	7
6 172 F.3d 467 (7 th Cir. 1999).....	
7 <u>Arroyo v. Wheat,</u>	7
8 591 F. Supp. 136 (D. Nev. 1984)	
9 <u>Bischel v. Fire Insurance Exchange,</u>	3
10 1 Cal. App. 4 th 1168 (1992).....	
11 <u>Breashears v. Indiana Lumbermens Mut. Ins. Co.,</u>	3, 4
12 256 Cal. App. 2d 245 (1967).....	
13 <u>Brizuela v. Calfarm Ins. Co.,</u>	15
14 116 Cal. App. 4 th 578 (2004).....	
15 <u>Denholm v. Houghton Mifflin Co.,</u>	9
16 912 F.2d 357 (9 th Cir. 1990).....	
17 <u>Diamond v. Insurance Co. of North America,</u>	2, 3, 12
18 267 Cal. App. 2d 415 (1968).....	
19 <u>Gibson v. Gov't Employees Ins. Co.,</u>	11
20 162 Cal. App. 3d 441 (1985).....	
21 <u>Good v. Prudential Ins. Co. of America,</u>	6
22 5 F. Supp. 2d 804 (N.D. Cal. 1998) (Wilken, J.)	
23 <u>Holder v. Home Savings & Loan Ass'n,</u>	9
24 267 Cal. App. 2d 91 (1968).....	
25 <u>Holland v. Bank of America,</u>	8
26 673 F. Supp. 1511 (1987).....	
27 <u>Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc.,</u>	11
28 115 Cal. App. 4 th 1145 (2004).....	
29 <u>McAdams v. McElroy,</u>	8
30 62 Cal. App. 3d 985 (1976).....	
31 <u>McCorkle v. State Farm Fire Ins. Co.,</u>	3
32 221 Cal. App. 3d 610 (1990).....	
33 <u>Semegen v. Weidner,</u>	8
34 780 F.2d 727 (9th Cir. 1985).....	

1	<u>Smith v. Allstate Ins. Co.,</u>	
2	160 F. Supp. 2d 1150 (S.D. Cal. 2001)	8
3	<u>Swartz v. KPMG LLP,</u>	
4	476 F.3d 756 (9th Cir. 2007).....	8
5	<u>U.S. Concord, Inc. v. Harris Graphics Corp.,</u>	
6	757 F. Supp. 1053 (N.D. Cal. 1991)	8
7	<u>Vess v. Ciba-Geigy Corp. USA,</u>	
8	317 F.3d 1097 (9th Cir. 2003).....	8
9		

STATUTES

10	Insurance Code § 2071	15
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11

OTHER AUTHORITIES

13	CCP § 338(d).....	8
14	CCP § 339(1).....	11
15	Rule 9(b).....	1, 7, 8
16	Rule 12(b)(6).....	1
17	Rule 12(e).....	1
18	Rule 12(f)	1
19		
20		
21		
22		
23		
24		
25		
26		
27		
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1 **I. INTRODUCTION AND SUMMARY**

2 This action arises out of an insurance claim for fire damage to plaintiff's property in
 3 Dublin, California. Plaintiff sues Travelers for breach of contract, bad faith, fraud, negligent
 4 misrepresentation, negligence, and reformation. Pursuant to Rule 12(b)(6) and Rule 12(f),
 5 Travelers challenges the complaint as follows:

6 • The fraud, negligent misrepresentation, negligence, and reformation claims
 7 should be dismissed because (1) they are not pleaded with the requisite
 8 particularity under Rule 9(b); and (2) they are all barred by the applicable statutes
 9 of limitations.

10 • The breach of contract claim and portions of the bad faith claim should be
 11 dismissed, because plaintiff's allegations concerning Travelers' rights and
 12 obligations are plainly contrary to the terms of the policy and case law.

13 In the alternative, Travelers moves for a more definite statement pursuant to Rule 12(e).

14 **II. BACKGROUND**

15 A. **The Policy**

16 Travelers issued to plaintiff a policy of commercial property and liability insurance. A
 17 copy of the policy is attached to plaintiff's complaint. For the Court's convenience, a copy of
 18 the complaint is submitted herewith as Exhibit A to the Declaration of Samuel H. Ruby.
 19 Pertinent excerpts of the policy are submitted as Exhibit B to the declaration. Hereinafter, we
 20 shall simply refer to Exhibit A as the "complaint" and Exhibit B as "the policy."

21 The policy concerns plaintiff's real and personal property at 8010 Hollanda Lane in
 22 Dublin, California. The policy's "Building and Personal Property Coverage Form" provides
 23 that Travelers "will pay for direct physical loss of or damage to Covered Property . . . caused by
 24 or resulting from a Covered Cause of Loss." (Policy at B-8.) The "Causes of Loss—Special
 25 Form" defines "Covered Cause of Loss" as "RISKS OF DIRECT PHYSICAL LOSS unless the
 26 loss is: (1) Excluded in Section B., Exclusions; or (2) Limited in Section C., Limitations." (Id.
 27 at B-18.) There is no exclusion or limitation for fire, so fire is a covered peril.

1 The policy provides two different methods for valuing lost or damaged property. One
2 method is the "replacement cost basis." As conditions precedent to recovery on a replacement
3 cost basis, the policy provides:

4 d. We will not pay on a replacement cost basis for any loss or
5 damage:
6 (1) Until the lost or damaged property is actually
7 repaired or replaced; and
8 (2) Unless the repairs or replacement are made as soon
9 as reasonably possible after the loss or damage.

10 (Policy at B-17.) Such conditions are standard and enforceable. See, e.g., Diamond v.
11 Insurance Co. of North America, 267 Cal. App. 2d 415 (1968).

12 If and when the insured actually replaces the damaged property, thus entitling the
13 insured to recover on a replacement cost basis, that basis is measured as follows:

14 e. We will not pay more for loss or damage on a replacement
15 cost basis than the least of:
16 (1) The Limit of Insurance applicable to the lost or
17 damaged property;
18 (2) The cost to replace, on the same premises, the lost
19 or damaged property with other property:
20 (a) Of comparable material and quality; and
21 (b) Used for the same purpose; or
22 (3) The amount you actually spend that is necessary to
23 repair or replace the lost or damaged property.

24 (Policy at B-17.) Generally, the applicable measure is Clause (2), the reasonable cost of
25 repairing or replacing the property with comparable property—assuming the insured actually
26 spends that much. If the insured spends less than expected, then under Clause (3), recovery is
27 limited to the amount actually spent. And under Clause (1), Travelers never pays more than the
28 policy limit.

29 The policy provides that prior to actually repairing or replacing and making claim on a
30 replacement cost basis, the insured may make a *preliminary* claim on a different basis:

31 You may make a claim for loss or damage covered by this
32 insurance on an actual cash value basis instead of on a
33 replacement cost basis. In the event you elect to have loss or
34 damage settled on an actual cash value basis, you may still make a
35 claim for the additional coverage this Optional Coverage provides,
36 if you notify us of your intent to do so within 180 days after the
37 loss or damage.

1 (Policy at B-17.) By endorsement, plaintiff's policy defines actual cash value as "the amount it
 2 would cost to repair or replace Covered Property, at the time of loss or damage, with material of
 3 like kind and quality, subject to a deduction for deterioration, depreciation and obsolescence."
 4 (Id. at B-36.) In other words, actual cash value is replacement cost *minus* depreciation.

5 The "like kind and quality" proviso found in both the replacement cost basis and actual
 6 cash value basis clauses is an important qualification. Because of that qualification, an insurer
 7 is not liable (on either basis) to pay for the cost of *improvements* the insured may make when
 8 repairing or replacing the property. This is true even if improvements are required by law, due
 9 to changes in building codes and ordinances. Bischel v. Fire Insurance Exchange, 1 Cal. App.
 10 4th 1168 (1992); McCorkle v. State Farm Fire Ins. Co., 221 Cal. App. 3d 610, 615 (1990);
 11 Breashears v. Indiana Lumbermens Mut. Ins. Co., 256 Cal. App. 2d 245, 248 (1967). Under the
 12 policy and the law, replacement cost is the cost of replacing what the insured *had*—nothing
 13 more. Similarly, actual cash value (as defined in this policy) is the cost of replacing what the
 14 insured *had*, minus the amount by which that property was depreciated.

15 Of course, changes in building codes often preclude an insured from rebuilding a
 16 structure exactly as it was before the loss. Because the costs of "code upgrades" are not
 17 included in replacement cost or actual cash value, a supplemental form of coverage has evolved
 18 for them. Here, by way of a "Property Extra Plus" endorsement, Travelers provided such
 19 coverage to plaintiff. Labeled "Ordinance or Law Coverage," it provides coverage for "the
 20 increased cost to repair, rebuild or construct the property cause by enforcement of building,
 21 zoning or land use ordinance or law." (Policy at B-25.) Like the replacement cost coverage, the
 22 Ordinance or Law Coverage is subject to conditions precedent:

23 We will not pay for increased costs under this coverage:

24 (1) Until the property is actually repaired or replaced, at the same
 location or elsewhere if required by ordinance or law; and

25 (2) Unless the repairs or replacement are made as soon as
 reasonably possible after the loss or damage, not to exceed two
 years. We may extend this period in writing during the two years.

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1 (Id. at B-25 and B-26) Thus, the insured may recover code upgrade costs only in conjunction
2 with a replacement cost claim. Travelers has no obligation to pay code upgrade costs in
3 advance.

4 **B. The Loss**

5 Plaintiff's property is a former home on a corner lot in a residential area. Some years
6 ago, it was modified for use as a preschool. Plaintiff purchased the property in 2000 and
7 continued to operate a preschool there until it was damaged by a fire on November 17, 2004.

8 On the day of the fire, Travelers dispatched adjuster Jim Davis to the scene. Davis met
9 plaintiff there and discussed the policy's coverages with her. Within days, Davis issued plaintiff
10 a check for \$15,000 as an advance towards her loss of personal property (even though she had
11 not yet provided Travelers with any inventory of what was lost). Shortly thereafter, the claim
12 was reassigned to adjuster Allyson Delgado.

13 To assist her with her investigation, Delgado consulted with Hohback-Lewin, Inc.
14 (structural engineers) and Walter Springs Construction, Inc. (a general contractor). On
15 November 22, 2004, Delgado—joined by Chris Morton of Hohback-Lewin and Murat Zilinki of
16 Walter Springs—inspected the property. It was obvious that the roof, some of the wall framing,
17 a small portion of the floor framing, and all of the interior finishes were completely damaged by
18 the fire. However, it was not evident that all of the wall and floor framing had been
19 compromised by the fire.

20 **C. The Actual Cash Value Payments**

21 Because Singleton had not yet even begun (much less, completed) repairs, Delgado's
22 immediate task was adjust the loss on an actual cash value basis. Towards that end, Delgado
23 requested that Zilinki prepare an estimate of the cost of replacing, with "like kind and quality,"
24 the portions of the structure known to be physically damaged. After a further inspection and
25 some discussion, some items were added to the estimate, which ultimately came to \$176,715.59.
26 This was not just an estimate by Zilinki; his company was hoping to get the job and would have
27 done the work for that price.

28

1 In December 2004, while continuing to review the claim, Delgado issued an advance of
2 \$50,000 to plaintiff. In February 2005—after waiting a reasonable time for plaintiff to submit
3 her own estimates—Delgado proceeded to adjust the claim based on the Zilinki estimate. After
4 applying depreciation, the policy deductible, and credit for the previous advance, Delgado
5 approved a further actual cash value payment of \$104,852.49.

6 Delgado wrote to plaintiff to explain the payment and advise plaintiff that she could
7 make a supplemental claim on a replacement cost basis—including a claim for code upgrade
8 costs—if she were to actually replace the building. With the letter, Delgado enclosed copies of
9 the Morton report and the Zilinki estimate. Plaintiff never responded to that letter, nor to a
10 follow-up letter sent by Delgado in April 2005. Nor, at any time after the fire, did plaintiff
11 request any payments for loss of income or extra expense. Plaintiff was obviously aware that
12 the policy did not provide coverage for such losses.

13 **D. Plaintiff's Delay In Making Repairs**

14 For months, Delgado heard nothing from plaintiff about the repair of the building or any
15 further claim for loss of personal property. In the summer of 2005, various contractors began
16 contacting Delgado, each implying that plaintiff had chosen him to do the reconstruction work.
17 At least one of those contractor's estimate called for a greater scope of work than had been
18 assumed in the Zilinki estimate.

19 In July 2005, Delgado returned to the site to refresh her recollection of the extent of the
20 damage and see if the property had deteriorated since the fire. During her reinspection, Delgado
21 met with plaintiff. Delgado attempted to impress upon plaintiff that she needed to choose a
22 contractor and start repairs before Travelers could entertain a supplemental claim under the
23 replacement cost and code upgrade provisions of the policy.

24 After the meeting, Delgado was contacted by yet another contractor, Mike Snow, who
25 represented that he was in negotiations with plaintiff. Delgado offered to meet with Snow to go
26 over Snow's quote and try to reach agreement on the necessary scope of work and a reasonable
27 price. However, Snow refused to meet with Delgado.

28

1 **E. Subsequent Events**

2 On September 13, 2005, Delgado received a letter from Kevin Dawson, a public
 3 adjuster, advising that plaintiff had retained him to represent her in connection with the claim.
 4 So began an odyssey that brought Travelers nothing but frustration and undue expense. The full
 5 tale cannot be told here, but suffice it to say that after more than two years, plaintiff had still not
 6 even begun repairs; she continued to decline requests for a meeting with her and Snow; and
 7 when the claim proceeded to an appraisal at her request, she withheld relevant documents until
 8 the eve of the appraisal hearing. Then, after the appraisal award was not to her liking, she
 9 rejected it and filed this lawsuit.

10 **F. The Complaint**

11 Plaintiff filed her complaint in state court on February 19, 2008. Against Travelers,
 12 plaintiff asserts no less than six causes of action—reformation, breach of contract, breach of the
 13 implied covenant of good faith and fair dealing (“insurance bad faith”), fraud, negligent
 14 misrepresentation, and negligence. Plaintiff also sues Delgado, personally, for intentional
 15 infliction of emotional distress. However, Delgado is a sham defendant, because she did
 16 nothing “outrageous”—and even if she did, the claim against her (which arises out of the events
 17 in 2004 and 2005) is time-barred.¹

18 In addition, plaintiff sues Travelers’ consultants (Morton and his employer, Hohback-
 19 Lewin; Zilinki and his employer, Walter Springs; and Isam Hasenin, who testified as an expert
 20 witness at the appraisal hearing). She also sues her broker, Uren Harrison Kennedy Insurance
 21 Agency; the former holder of the mortgage on her property, Textron Financial; and the current
 22 mortgage holder, Bank of the West. All of those parties are also sham defendants, either
 23 because there is no cause of action against them under California law, or because any such cause
 24 of action is time-barred.

25 Because those other defendants (some of whom are California citizens) are fraudulently
 26 joined, their citizenship does not destroy diversity jurisdiction. See, e.g., Good v. Prudential
 27 Ins. Co. of America, 5 F. Supp. 2d 804 (N.D. Cal. 1998) (Wilken, J.) (denying motion to

28 ¹ Delgado has not been served.

1 remand). Accordingly, Travelers exercised its right to remove this action to this Court. Having
 2 filed no answer or motion in state court prior to removal, Travelers now presents to this Court a
 3 consolidated motion to dismiss and/or strike and/or require a more definite statement of
 4 plaintiff's complaint.

5 **III. MOTION STANDARD**

6 Prior to filing a responsive pleading, a defendant may move for dismissal on the grounds
 7 that the complaint fails to state a cause of action upon which relief can be granted. FRCP
 8 12(b)(6). A defendant may also move to strike "any redundant, immaterial, impertinent, or
 9 scandalous matter" alleged in the complaint. FRCP 12(f). A defendant may also move for a
 10 "more definite statement of a pleading" if the pleading is "so vague or ambiguous that the party
 11 cannot reasonably prepare a response." FRCP 12(e).

12 **IV. ARGUMENT**

13 **A. The Fourth, Fifth, And First Causes Of Action Should Be Dismissed**

14 **1. The Claims Are Not Stated With Requisite Particularity**

15 Plaintiff brings several causes of action relating to the policy's lack of business
 16 interruption coverage. In her fourth cause of action (fraud), she alleges fraudulently induced her
 17 to purchase the policy with intentional misrepresentations. In her fifth cause of action, she
 18 incorporates the same allegations of false representations but downgrades Travelers' alleged
 19 state of mind from intentional misrepresentation to negligent misrepresentation. In her first
 20 cause of action (reformation), she again alleges that Travelers made certain representations, but
 21 in this case, *with* the intent to perform—and that it is just a mistake (which the Court should
 22 correct) that the policy, as issued, does not contain business interruption coverage.

23 "In alleging fraud or mistake, a party must state with particularity the circumstances
 24 constituting the fraud or mistake." FRCP 9(b). This rule requires that plaintiff "allege the who,
 25 what, where, and when of the alleged fraud." Ackerman v. Northwestern Mut. Life Ins. Co.,
 26 172 F.3d 467, 469 (7th Cir. 1999). For example, the defendant must also identify the actual
 27 source of the fraud (i.e., whether the fraudulent statement was oral or written and, if written, the
 28 particular documents involved). Arroyo v. Wheat, 591 F. Supp. 136, 139 (D. Nev. 1984).

1 Where several defendants are sued for fraud, the plaintiff must “inform each defendant
 2 separately of the allegations surrounding his alleged participation in the fraud.” Swartz v.
 3 KPMG LLP, 476 F.3d 756, 764–765 (9th Cir. 2007); Vess v. Ciba-Geigy Corp. USA, 317 F.3d
 4 1097, 1106 (9th Cir. 2003).²

5 Plaintiff’s complaint fails to meet those requirements. At ¶ 50, plaintiff alleges that
 6 through “employees, officers, directors, representatives and agents,” Travelers represented that
 7 it “would pay for fire damage to the insured building, its contents, and for loss of income and
 8 additional expenses should an insured peril render the building uninhabitable.” Nowhere in the
 9 complaint does plaintiff name the “employees, officers, directors, representatives and agents”
 10 who made that alleged representation. Nowhere in the complaint does plaintiff allege with any
 11 particularity the date of the representation. Nowhere in the complaint does plaintiff allege
 12 whether the representation was oral or written (nor, if written, does plaintiff attach or identify
 13 the writing). Thus, the claim fails the “who, what, where, and when” test and must be dismissed
 14 pursuant to FRCP 9(b).³

15 2. The Claims Are Time-Barred

16 Under California law, the statute of limitations on claims for relief based on fraud or
 17 mistake is three years. CCP § 338(d). Like Rule 9(b)’s heightened pleading requirements, that
 18 statute of limitations applies not only to claims for fraud *per se* but also to claims for negligent
 19 misrepresentation and reformation. Holland v. Bank of America, 673 F. Supp. 1511, 1515
 20 (1987); McAdams v. McElroy, 62 Cal. App. 3d 985, 1001 (1976).

21 Plaintiff alleges that Travelers fraudulently induced her to purchase the policy. As
 22 revealed on its face, that policy was issued on September 19, 2003 for the period of November
 23 2003 to November 23, 2004. (Policy at B-2.) Thus, the alleged fraudulent inducement must
 24

25 ² Because Rule 9(b) applies not only to fraud, *per se*, but also “mistake,” the heightened
 26 pleading requirements apply not only to claims for intentional misrepresentation but also claims
 27 for negligent misrepresentation and reformation. U.S. Concord, Inc. v. Harris Graphics Corp.,
 28 757 F. Supp. 1053, 1059 (N.D. Cal. 1991); Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir.
 1985); Smith v. Allstate Ins. Co., 160 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001).

29 ³ At the very least, the Court should require a *more definite statement* of the claim.

1 have occurred prior to September 19, 2003—more than three years before plaintiff filed this
2 action. Similarly, any *negligent* misrepresentation or mistake in assembling the policy occurred
3 more than three years before suit was filed.

4 Granted, the statute of limitations on fraud and mistake claims is subject to a “discovery
5 rule,” whereby the running of the statute tolls until the plaintiff discovers (or should reasonably
6 have discovered) the fraud or mistake. CCP § 338(d). However, “A plaintiff on a fraud claim
7 brought over three years after the commission of the fraud must ‘affirmatively excuse his failure
8 to discover the fraud within three years after it took place, by establishing facts showing that he
9 was not negligent in failing to make the discovery sooner and that he had no actual or
10 presumptive knowledge of facts sufficient to put him on inquiry.’” Denholm v. Houghton
11 Mifflin Co., 912 F.2d 357, 362 (9th Cir. 1990) (citations omitted). “Such affirmation must be in
12 the complaint.” Id. The complaint must allege “the time and manner of the discovery of the
13 fraud, and the facts which excuse the plaintiff’s failure to discover the fraud sooner.” Id. (citing
14 Holder v. Home Savings & Loan Ass’n, 267 Cal. App. 2d 91, 110 (1968).) “This rule is strictly
15 adhered to,” and “poorly pleaded fraud claims” will be dismissed. Id.

16 Plaintiff alleges that Travelers fraudulently induced her to purchase the policy with a
17 false representation that it would provide coverage for loss of income and extra operating
18 expenses (i.e., “business interruption coverage”) in the event that her operations at the property
19 were suspended by covered damage. Plaintiff does not allege when or how she first discovered
20 that the policy does not provide business interruption coverage. Nor does she allege why she
21 reasonably did not discover the lack of coverage sooner. Those omissions are fatal.

22 Travelers denies that plaintiff ever asked for business interruption coverage and that
23 Travelers defrauded her or made some mistake in the course of assembling the policy. But
24 whatever happened when she procured the policy, plaintiff will be unable to amend to allege
25 that only since February 19, 2005 (i.e., in the three year before suit was filed) was she able to
26 discover the policy’s lack of business interruption coverage. The fire occurred on November
27 17, 2004. Plaintiff’s need for benefits for loss of income and extra operating expenses would
28 have been immediate. Yet plaintiff made no *request* for business interruption benefits. One can

1 only conclude that she *knew*, on the date of the fire or shortly thereafter, that the policy provides
 2 no business interruption coverage.⁴

3 **3. At A Minimum, The Court Should Strike Portions Of The Claim**

4 In addition to alleging false promises of business interruption coverage, plaintiff alleges
 5 that Travelers (1) represented that it would pay for fire damage to the insured building and its
 6 contents, (2) that the representation was false; but that (3) believing it was true, she did not
 7 purchase another policy “that would have covered damage caused by fire to the insured building
 8 [and] its contents.” (Complaint, ¶¶ 50-53.) Those allegations make no sense. As discussed
 9 above, Travelers’ policy *does* cover fire. Travelers has never asserted otherwise, and elsewhere
 10 in her complaint, plaintiff concedes that Travelers made payments on the claim. (See Complaint
 11 at 8:1-3.) Thus, Travelers’ alleged representation that the policy would cover fire was *true*.

12 Wherefore, if the Court does not dismiss the fraud claim entirely, the Court should strike
 13 Page 10, lines 12-13 (“...for fire damage to the insured building, its contents, and...”; lines 15-
 14 16 (“...for damage caused by fire to the building, its contents, or...”); lines 20-21 (“...for
 15 damage caused by fire to the insured building, its contents and...”); and lines 25-26 (“...damage
 16 caused by fire to the insured building, its contents and...”).

17 **B. The Seventh Cause Of Action (Negligence) Should Be Dismissed**

18 Though styled as a negligence claim, plaintiff’s seventh cause of action repeats her
 19 allegations of fraud and misrepresentation. (Complaint, ¶¶ 78-80.) Insofar as the seventh cause
 20 of action covers the same ground as her claims for fraud, negligent misrepresentation, and
 21 reformation, it should be dismissed for the reasons discussed above.

22 Almost in passing—at ¶ 83—plaintiff appears to allege that Travelers had (and
 23 breached) a duty to “determine the necessary kinds and amounts of insurance [plaintiff] needed
 24 to protect [her] financial interest in the building, its contents [and] the potential loss of earnings
 25 and extra expenses.” However, an insurance company is not obligated to provide advice to a

26 ⁴ Indeed, notes written by Jim Davis, the first adjuster assigned to the claim, indicate that he
 27 discussed plaintiff’s policy—including the lack of business interruption coverage—with her
 28 during their meeting at the site on the day of the fire. It is also known that plaintiff had
 conversations with her broker between the date of the fire and February 18, 2005.

1 prospective insured or issue a policy that provides greater coverage than what the insured
 2 specifically requested. Gibson v. Gov't Employees Ins. Co., 162 Cal. App. 3d 441 (1985). In
 3 Gibson, the court explained:

4 Plaintiffs have not cited, and we have not found, any case which
 5 extends either a fiduciary duty or a covenant of good faith and fair
 6 dealing owed by an insurer or an insurance company to its insured
 7 beyond the terms of the insurance contract in force between them .
 8 . . . an insured person's initial decision to obtain insurance and the
 9 corresponding decision of an insurer to offer coverage remain, at
 10 the inception of the contract at least, an arm's length transaction to
 11 be governed by traditional standards of freedom of contract.

12 Id. at 448. Given that Travelers did not owe the alleged duty of care, Travelers cannot be liable
 13 for negligence.

14 Moreover, even if Travelers somehow had a duty of care to give plaintiff more coverage
 15 than she requested, plaintiff's negligence would still fail—because it is time-barred. The statute
 16 of limitations on an action “not founded upon an instrument in writing” is two years. CCP §
 17 339(1). This is the statute that governs claims against an insurance *broker* for professional
 18 negligence. Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc., 115 Cal.
 19 App. 4th 1145 (2004) (two-year statute of limitations applied to claim against insurance broker
 20 for negligently failing to insure several of the insured's locations). If there existed a cause of
 21 against an insurance *company* for such negligence, it would be governed by the same statute.
 22 As discussed above, the policy was issued in 2003, and plaintiff does not allege delayed
 23 discovery of the policy's alleged shortcomings. Thus, if for no other reason, her negligence
 24 claim should be dismissed as untimely.

25 **C. The Second Cause Of Action (Breach of Contract) Should Be Dismissed**

26 The statute of limitations on claims for breach of a written contract is four years. The
 27 loss occurred in November 2004, so Travelers' handling of the claim occurred wholly within
 28 four years of the filing of this suit. Accordingly, Travelers concedes that unlike the claims
 previously discussed, the breach of contract claim is timely. However, for other reasons, it still
 fails to state a cause of action upon which relief may be granted.

1 **1. Travelers Was Not Obligated To Pay For The Building Damage On A**
 2 **“Diminution In Value” or “Replacement Cost” Basis**

3 Plaintiff alleges three breaches of the contract. First, she alleges that Travelers “failed
 4 and refused to pay Plaintiff her losses as measured by the diminution in value and the
 5 replacement costs of her insured building.” (Complaint, ¶ 29.) However, Travelers was not
 6 obligated to pay for the building damage by either measure.

7 As discussed above, it is a condition precedent to recovery on a replacement cost basis
 8 that the insured actually replace the property. (Policy at B-17); Diamond v. Insurance Co. of
 9 North America, 267 Cal. App. 2d 415 (1968). Otherwise, the insured is limited to recovering on
 10 an actual cash value basis. (Policy at B-17). Indeed, elsewhere in her complaint, plaintiff
 11 concedes that those were the “two options” here. (Complaint, ¶ 116.) Diminution in market
 12 value is *never* the measure of a loss under Travelers’ policy.

13 Plaintiff did not replace the building. She blames this on the alleged fact that after she
 14 endorsed one of Travelers’ actual cash value payments over to her mortgagee, Textron
 15 Financial, Textron applied the proceeds to the loan balance instead of releasing them back to
 16 plaintiff so that she could use the money to pay contractors. (Complaint, ¶¶ 114-115, 124.)
 17 Travelers denies that Textron did anything wrong—much less, did anything that necessarily
 18 precluded plaintiff from rebuilding.⁵ But even if plaintiff’s claim against Textron is valid, it is
 19 Textron who will have to answer for it. *Travelers* did not breach *its* contract with plaintiff by
 20 paying the claim on an actual cash value basis instead of on a replacement cost basis.

21 **2. Travelers Was Not Obligated To Pay For The Contents Loss On A**
 22 **“Diminution In Value” or “Replacement Cost” Basis**

23 Travelers’ second alleged breach of contract is that it “failed and refused to pay Plaintiff
 24 her loss as measured by the diminution in value and the replacement costs of her personal
 25 property in the insured building.” (Complaint, ¶ 30.) Again, diminution in market value is

26
 27 ⁵ Textron had a valid encumbrance on the property, and the mortgage agreement expressly
 28 allowed it to apply insurance proceeds to the loan balance. Moreover, because plaintiff’s
 principal debt was reduced, plaintiff was free to take out a new, second loan to finance
 reconstruction.

1 never a measure of loss under Travelers' policy. Again, Travelers had no duty to pay for loss of
 2 property on a replacement cost basis unless and until the property was actually replaced.

3 Plaintiff does not allege that she replaced her personal property—at least, not at a cost in excess
 4 of the \$15,000 advanced by Travelers just days after the fire.⁶

5 **3. Travelers Was Not Obligated To Pay For Business Interruption**

6 Travelers' third and final alleged breach of contract is that it "failed and refused to pay
 7 Plaintiff her "loss of income and additional business expenses incurred because the fire rendered
 8 her preschool uninhabitable." (Complaint, ¶ 31.) However, the policy does not provide for
 9 business interruption coverage. It is precisely for that reason that plaintiff brings claims for
 10 reformation, fraud, negligent misrepresentation, and negligence. As discussed above, all of
 11 those claims fail. As they fail, so fails plaintiff's allegation that Travelers breached the written
 12 contract by not paying business interruption benefits.

13 **4. At A Minimum, The Court Should Strike Portions Of The Contract Claim**

14 In the event that the Court finds that some parts (only some parts) of the breach of
 15 contract claim fail, the Court should strike the impertinent allegations so that the parties will not
 16 have to devote discovery and further motion practice to them.

17 **D. The Court Should Strike Portions Of The Bad Faith Claim**

18 As has become *de rigueur* in California, plaintiff not only brings a claim for breach of
 19 alleged express provisions of the policy but also a claim for breach of the *implied* covenant of
 20 good faith and fair dealing. In her "bad faith" claim, she recites a litany of alleged misconduct
 21 by Travelers. Most of the allegations are "boilerplate" obviously copied from a template.

22
 23
 24 ⁶ Plaintiff never responded to Travelers' letter of April 2005 requesting documentation in
 25 support of any further claim for loss of personal property. At her examination under oath in
 26 2006, she did not produce any such documentation and did not ask for any more money. On the
 27 contrary, her public adjuster advised Travelers that plaintiff accepted the \$15,000 as a full
 28 settlement of the personal property claim. And indeed, when there was an appraisal at
 plaintiff's request in 2007, she presented no evidence concerning her personal property loss and
 did not ask the appraisers to value that loss. Let fair warning be given now that any attempt by
 plaintiff to amend her complaint to further allege a breach of contract with respect to the
 personal property losses will expose her to a Rule 11 motion.

1 Travelers will deal with those allegations, based on the evidence, in good time. However, a few
 2 of the allegations can and should be stricken now as a matter of law.

3 **1. The Valuation And Business Interruption Allegations Should Be Stricken**

4 In her bad faith claim, plaintiff repeats or embellishes on allegations in her breach of
 5 contract claim concerning the policy's valuation clauses and lack of business interruption
 6 coverage. She alleges that Travelers agreed to pay:

7 ...the diminution of the market value and the replacement cost
 8 value of the insured building and the personal property in the
 9 building, and that Travelers and Does 1-30 would pay for the loss
 10 of income and the increase of businesses [sic] expenses that
 resulted from a business interruption resulting from a fire causing
 the insured building to become uninhabitable.

11 (Complaint at 6:14-17.) She also alleges:

12 In breach of the terms of Travelers' and Does 1-30's written
 13 policy of insurance and/or the Agreement as reformed by this
 14 Court, Travelers and Does 1-30 failed and refused to pay Plaintiff
 15 the reasonable cost to repair and replace the insured building,
 personal property, the loss of income and the increase in expenses
 for which the insurance provided in the event of a covered peril.

16 (Id. at ¶ 40.) As discussed above, the policy does not obligate Travelers to adjust losses on the
 17 basis of "diminution of market value," and because plaintiff did not actually replace the
 18 building, she is not entitled to recovery on a replacement cost basis. Also as discussed above,
 19 the policy does not include business interruption coverage, and her claims for reformation,
 20 fraud, misrepresentation, and negligence are inadequately stated and in any event untimely.

21 **2. The Code Upgrade Allegations Should Be Stricken**

22 Plaintiff levies a number of accusations concerning an alleged claim for "code upgrade"
 23 or "code improvement" costs. She alleges that Travelers wrongfully "withheld payment of the
 24 code improvements needed to repair the building." (Complaint at 7:23-25.) She alleges that
 25 Travelers claimed "without any reasonable basis that Plaintiff was not entitled to code
 26 improvements that were mandated by the building department and failing to pay the actual cash
 27 value for code upgrades." (Id. at 7:26-28.) And she alleges that Travelers failed to affirm or
 28 deny coverage for "code compliance repairs" within a reasonable time. (Id. at 8:7-8.)

1 Despite numerous explanations by Travelers over the last three-and-a-half years, plaintiff
 2 still does not understand the policy's "code upgrade" coverage. As discussed above, under the
 3 policy and California law, costs of anticipated code upgrades are excluded from the calculation
 4 of replacement cost and actual cash value because those measures look to what the insured *had*,
 5 not to *improvements* she will have to make if she rebuilds. Although Travelers' policy provides
 6 code upgrade coverage as a supplemental coverage (a fact it has never denied), the policy is
 7 clear that such benefits are payable only if and when code upgrade costs are incurred—not in
 8 advance. (Policy at B-25.) Plaintiff's allegations to the contrary are incorrect as a matter of
 9 law.

10 **3. The EUO Allegation Should Be Stricken**

11 Plaintiff complains that Travelers misrepresented the meaning of pertinent provisions in
 12 the policy of insurance by, among other things, "denying liability for Plaintiff's covered losses
 13 on the ground that she failed to sign her examination under oath." (Complaint at 7:12-14.) An
 14 "examination under oath" is similar to a deposition. It is a tool for investigation of claims that is
 15 provided for in most property insurance policies, and it is expressly authorized by Insurance
 16 Code § 2071. The pertinent clause of plaintiff's policy states:

17 **3. Duties In The Event Of Loss Or Damage**

18 You must see that the following are done in the event of loss or
 damage to Covered Property:

19 * * * * *

20 g. If requested, permit us to question you under oath at such
 21 times as may be reasonably required about any matter relating to
 this insurance or your claim, including your books and records. In
 22 such event, ***your answers must be signed.***

23 (Policy at B-13.) (emphasis added). California law is crystal clear that an insured's failure to
 comply with an examination under oath clause is grounds for denial of a claim. See, e.g.,
Brizuela v. Calfarm Ins. Co., 116 Cal. App. 4th 578 (2004).

24 Here, after initially refusing to submit to an examination under oath, plaintiff eventually
 25 did so (although even then, she did not provide all information and documents requested). For
 26 many months thereafter, and despite repeated requests, she refused to sign the transcripts of the
 27

1 examination. Plaintiff's allegation that she had no duty to sign the transcripts is contrary to the
2 policy terms and California law.

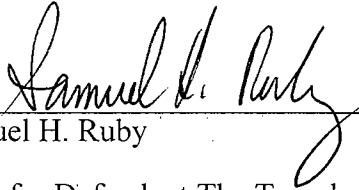
3 **V. CONCLUSION**

4 For the foregoing reasons, the Court should dismiss the First, Second, Fourth, Fifth, and
5 Seventh Causes Of Action. In the alternative, the Court should strike aforementioned portions
6 of those causes of action and/or require a more definite statement. The Court should also strike
7 the aforementioned portions of the Third Cause of Action.

8

9 DATED: April 14, 2008

10 BULLIVANT HOUSER BAILEY PC

11 By 
12 Samuel H. Ruby

13 Attorneys for Defendant The Travelers Indemnity
14 Company of Connecticut

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